

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

NWS Corporation, a Massachusetts
corporation,

Plaintiff,

vs.

DISH NETWORK, LLC, a Colorado
limited liability company,

Defendant.

CASE NO. 13cv2247-GPC(BGS)

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANT'S MOTION FOR
ATTORNEY FEES**

[Dkt. No. 28.]

Before the Court is Defendant's motion for attorney fees. (Dkt. No. 28.) Plaintiff filed a response on January 10, 2014. (Dkt. No. 31.) Defendant filed a reply on January 28, 2014. (Dkt. No. 34.) Based on a review of the briefs, supporting documents, and the applicable law, the Court GRANTS in part and DENIES in part Defendant's motion for attorney fees.

Background

On September 19, 2013, Plaintiff NWS Corporation ("NWS") filed a complaint against Dish Network, LLC ("Dish"). (Dkt. No. 1.) Plaintiff alleged causes of action for intentional interference with contractual relations, tortious interference of business, intentional interference with prospective economic advantage, refusal to furnish service in violation of 47 U.S.C. § 201(A), and unfair business practices. (*Id.*) It also sought preliminary injunctive relief. (*Id.*) On September 20, 2013, Plaintiff filed an *ex parte*

1 motion for temporary restraining order. (Dkt. No. 4.) After briefing and hearing oral
 2 argument, the Court denied Plaintiff's motion for a temporary restraining order on
 3 September 30, 2013. (Dkt. No. 16.)

4 On October 4, 2013, the parties filed a joint motion for extension of time to
 5 respond to the Complaint. (Dkt. No. 20.) On October 24, 2013, Defendant filed a
 6 motion to dismiss. (Dkt. No. 23.) On November 21, 2013, Plaintiff filed a notice of
 7 voluntary dismissal without prejudice. (Dkt. No. 25.)

8 Discussion

9 Defendant seeks attorney fees in the amount of \$125,840.65 consisting of
 10 \$112,111.15 for time spent prior to the reply to the motion for attorney fees and
 11 \$13,729.50 in fees related to the reply.¹ Dish contends it is the prevailing party and is
 12 entitled to attorney fees pursuant to the attorney fee provision in the Dish Network
 13 Retailer Agreement ("Retailer Agreement" or "Agreement") between Dish and NWS.
 14 Defendant opposes and presents numerous arguments that Dish is not entitled to
 15 attorney fees.

16 A. Whether Attorney Fee Shifting Provision in the Retailer Agreement Applies

17 NWS argues that the attorney fee provision in the Retailer Agreement does not
 18 apply to the instant case. Dish contends that the broad attorney fee provision applies.

19 First, NWS argues that Dish cannot recover fees on an expired, inadmissible,
 20 blank and unsigned form contract. NWS challenges Brianna Andersen's qualifications
 21 to authenticate the Retailer Agreement because she was not employed by Dish in her
 22 present capacity when the parties allegedly entered into the Agreement in 2010.
 23 Moreover, the agreement attached to the motion is blank, unsigned and does not
 24 reference NWS. Therefore, NWS contends that there is no evidence that the parties
 25 entered into the Retailer Agreement. In reply, Dish asserts that it properly

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 27 ¹Originally, in the moving papers, Defendant sought \$130,720.40 in fees plus
 28 estimated additional \$15,000 in fees to review NWS's opposition, prepare a reply and
 prepare for and attend any oral argument. However in its reply, it reduced these
 amounts to \$125,840.65 reflecting several write-offs and discounts offered to Dish
 after the filing of its motion for attorney fees.

1 authenticated the Agreement not only by Andersen, who is Corporate Counsel, but also
2 in its reply, it supplements its authentication of the Retailer Agreement by providing
3 a declaration of Melissa Van Vorst, who is Operations Manager for Dish and has been
4 employed by Dish since 2002. (Dkt. No. 37.)

5 Under Federal Rule of Civil Procedure 901, the “proponent must produce
6 evidence sufficient to support a finding that the item is what the proponent claim it is.”
7 Fed. R. Civ. P. 901(a). As to testimony of a witness with knowledge, the proponent
8 must present “testimony that an item is what it claimed to be.” Fed. R. Civ. P.
9 901(b)(1).

10 Here, Van Vorst has personal knowledge concerning the Sales Operations
11 Division that supports Dish’s indirect sales partners in 2010. (Dkt. No. 37, Van Vorst
12 Decl. ¶ 3.) She also has personal knowledge regarding the procedures on Siebel which
13 is “a system-partner relationship manager systems that houses the account information
14 and contracts of all of Dish’s indirect sales partners, including NWS Corporation.” (Id.
15 ¶ 2.) The Court concludes that Van Vorst declaration is sufficient to authenticate the
16 Retailer Agreement signed by the parties in December 2010. Whether or not
17 Andersen’s declaration properly authenticates the Retailer Agreement, the declaration
18 of Van Vorst cures any alleged defect with Anderson’s original authentication of the
19 Retailer Agreement.

20 In her declaration, Van Vorst explains the procedure on how a retailer enters into
21 an electronic Retailer Agreement with Dish. (Id. ¶¶ 4-10.) The records indicate that
22 NWS entered into the Retailer Agreement and agreed to be bound by its terms and
23 conditions when Dish’s software auto-populated the information put in by NWS onto
24 the Agreement. (Id. ¶ 8.) The electronically-signed, auto-populated version of the
25 Agreement would have been available to Douglas De Leo, NWS’s VP at the time, and
26 now CEO, for as long as the account existed. (Id., Ex. C.) Attached to the Van Vorst
27 declaration, is a Retailer Agreement which lists NWS as a party to the contract. (Id.,
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1 Ex. B (under SEAL).)² Lastly, Dish attaches a screenshot from its software confirming
2 that the agreement was signed in December 2010 by Douglas De Leo. (*Id.*, Ex. D.)

3 Moreover, although the Agreement's initial term expired in December 2012, the
4 attorney fee provision concerning disputes as to any provision in the agreement
5 survives termination or expiration. (Dkt. No. 39, Van Vorst Decl., Ex. B at 31 (under
6 SEAL).)

7 Therefore, NWS's argument that Dish provided an expired, inadmissible, blank
8 and unsigned form contract is without merit. The Court also finds NWS's argument
9 disingenuous as the Complaint alleges that NWS and Dish entered into a retailer
10 agreement with an Effective Date as of December 31, 2010" (Dkt. No. 1, Compl.
11 ¶ 12.) Moreover, as Dish points out, NWS did not dispute the authenticity of the
12 Retailer Agreement in its *ex parte* application for temporary restraining order. NWS's
13 attempt to dispute the existence of the Retailer Agreement fails.

14 NWS also argues that the claims alleged in the Complaint do not arise from the
15 Agreement, and therefore, the attorney fee provision is inapplicable. It alleges that the
16 claims in the Complaint "do not arise out of any contractual agreement with Dish" and
17 asserts that there "is no interrelationship between the claims arising from Dish
18 interference with NWS's contracts with the Navy and 4Com, on the one hand, and the
19 alleged agreement between NWS and Dish, which expired in 2012." (Dkt. No. 31 at
20 19, 20 (emphasis in original).) Defendant argues that the claims fall within the broad
21 scope of the parties' attorney fee shifting provision.

22 Contrary to NWS's assertions, the allegations in the Complaint arise out of the
23 Dish Retailer Agreement. For example, according to the Complaint, NWS and Dish
24 entered into a retailer agreement with an effective date of December 31, 2010. (Dkt.
25 No. 1, Compl. ¶ 12.) The Complaint cites or restates relevant provisions of the Retailer
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27 ²The Court notes that while the Retailer Agreement has been filed under seal,
28 Dish publicly filed citations to provisions of the Agreement in its briefs. Accordingly,
it appears that the specific provisions cited by Dish are not subject to sealing.
Therefore, the Court's reference to these provisions are also not subject to sealing.

1 Agreement. (Id. ¶¶ 12, 13.) The Complaint also states that since the Dish Agreement
 2 is confidential, it is not attached to the Complaint implicating that if it were not
 3 confidential, the Agreement would have been attached to the Complaint. (Id. ¶ 12.)
 4 Headings in the Complaint include: “Dish Refuses to Perform under the Dish Contract”
 5 (id. at 7; see also ¶ 37); and “Dish Terminates Service at the Naval Installation.” (Id.
 6 at 8). The Complaint further alleges that “Dish thus breached the Dish Contract by
 7 failing to provide service through the 90-day transition period following the conclusion
 8 of the Bridge Contract.” (Id. ¶ 34.)

9 While Plaintiff disclaims³ that the Dish Retailer Agreement has any bearing on
 10 the Complaint and is not being sued on, the allegations concerning Dish’s actions are
 11 based on its failure to abide by the terms of the Retailer Agreement and are asserted
 12 throughout the Complaint. Moreover, the attorney fee provision in the Agreement is
 13 broad covering disputes as to any provision in the Agreement. Therefore, Plaintiff’s
 14 argument that the claims in the Complaint do not arise from the Agreement is not
 15 persuasive.

16 Lastly, Plaintiff argues that the Retailer Agreement is unconscionable,
 17 procedurally and substantively. Defendant opposes. Unconscionability has a
 18 procedural and a substantive element. A & M Produce Co. v. FMC Corp., 135 Cal.
 19 App. 3d 473, 486 (1982). The procedural component focuses on oppression, unequal
 20 bargaining power, and surprise. Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1532
 21 (1997). The substantive element “has to do with the effects of the contractual terms
 22 and whether they are unreasonable.” Marin Storage & Trucking, Inc. v. Benco
 23 Contracting and Eng’g, Inc., 89 Cal. App. 4th 1042, 1053 (2001). This element must
 24 be evaluated at the time the contract was made. Stirlen, 51 Cal. App. 4th at 1532. “To
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26 ³The Complaint alleges that “[w]hile Dish’s above-mentioned breach of the Dish
 27 Contract is actionable, this lawsuit is not based on any matter, claim or cause of action
 28 arising from the Dish Contract. The Dish Contract has no bearing on this lawsuit.”
 (Dkt. No. 1, Compl. ¶ 36.)

1 be unenforceable, a contract must be both procedurally and substantively
 2 unconscionable.” Id. The Court looks at whether the contract terms are so
 3 unreasonable, unjustified, or one-sided as to “shock the conscience.” Id. at 1055.

4 Plaintiff argues that enforcing a blank, unsigned form contract that has not been
 5 properly authenticated is procedurally unconscionable. As discussed above, the Court
 6 determined that the Retailer Agreement was properly authenticated and NWS
 7 electronically entered into the Agreement with Dish. Therefore, this argument fails.

8 As to substantive unconscionability, Plaintiff summarily argues that the fact that
 9 the attorney provision applies to any and all disputes between NWS and Dish for all
 10 of eternity⁴ and that all disputes are to go through the Colorado District Courts subject
 11 to Colorado law make the contract unconscionable. Plaintiff does not explain why
 12 these provision are one-sided, unreasonable and unjustified as to shock the conscience.
 13 Moreover, since Plaintiff has not demonstrated procedural unconscionability, he cannot
 14 prevail on his argument regarding unconscionability. See Stirlen, 51 Cal. App. 4th at
 15 1533 (in order to be unenforceable, a contract must be both procedurally and
 16 substantively unconscionable). Accordingly, the Court concludes that the attorney fee
 17 provision is not unconscionable.

18 Based on the above, the Court concludes that the attorney fee-shifting provision
 19 in the Retailer Agreement applies to this case. The attorney fee provision in the
 20 Agreement provides:

21 In the event of any suit, action or arbitration between Retailer and/or
 22 any of its Affiliates, on the one hand, and DISH and/or any of its
 23 Affiliates, on the other hand, including without limitation any and all
 24 suits, actions or arbitrations to enforce this Agreement, any Business
 25 Rules, any Promotional Program or any provisions hereof or thereof,
 26 subject to Section 15.3.3, the prevailing party shall be entitled to
 27 recover its costs, expenses and reasonable attorneys’ fees, at
 28 arbitration, at trial and on appeal, in addition to (and without limitation
 of) all other sums allowed by law. The provisions of this Section 17.

27 ⁴While the attorneys fee provision is broad and survives expiration or
 28 termination of the Agreement, it is limited to any suit arising out of any provision in
 the Retailer Agreement. (Dkt. No. 39, Van Vorst Decl., Ex. B at 31 (under SEAL).)

1 11 shall survive expiration or termination of this Agreement (for any
2 reason or no reason) indefinitely.

3 (Dkt. No. 39, Van Vorst Decl., Ex. B at 31 (under SEAL).) Although the contract
4 expired on December 31, 2012, the attorney fee provision survives expiration or
5 termination. (See id. (under SEAL).) Under the Agreement, a prevailing party is
6 entitled to recover attorney fees. (See id. (under SEAL).) The Court looks to see what
7 applicable state law applies to interpret the term “prevailing party” because a
8 “prevailing party is identified with reference to the law of the state that governs the
9 contract providing for an award of attorneys’ fees.” Laurel Village Bakery, LLC v.
10 Global Payments Direct, Inc., No. C06-1332 MJJ(MEJ), 2006 WL 3499234, at *2
11 (N.D. Cal. 2006).

12 **B. Choice of Law Provision**

13 The Retailer Agreement contains a Colorado choice of law provision as to any
14 claims between the parties. (Dkt. No. 39, Van Vorst Decl., Ex. B § 15.5 (under
15 SEAL).) Neither party directly addresses this provision. While Dish raises the choice
16 of law provision, it argues that since both Colorado and California have similar laws
17 regarding prevailing party, it would prevail under either state law. Plaintiff does not
18 address the Colorado choice of law provision, and without explanation or authority,
19 applies California law. Since the Court is to interpret the attorney fee provision in the
20 Retailer Agreement, the Court must consider the choice of law provision.

21 Since this is a diversity case, the court applies the choice of law rules of the
22 forum state, which is California. Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 645
23 (9th Cir. 1988). In California, when “a choice of law provision has been negotiated at
24 arm’s length, the law of the state chosen by the parties will apply as long as the chosen
25 state has a substantial relationship to the parties or their transaction or there is any other
26 reasonable basis for the parties’ choice of law and as long as the chosen state’s law is
27 not contrary to a fundamental policy of California.” Nedlloyd Lines B.V. v. Superior
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1 Court, 3 Cal.4th 459, 466 (1992). A substantial relationship is present when at least
 2 one of the parties resides in the chosen state. Id. at 468 (Hong Kong—the chosen
 3 state—had substantial relationship to the parties in a breach of contract action where
 4 two of the parties were incorporated under the laws of Hong Kong and had registered
 5 offices there.) Here, Dish is a Colorado limited liability company with its principal
 6 place of business in Colorado. (Dkt. No.1, Compl. ¶ 2.) Therefore, Colorado has a
 7 substantial relationship to the parties. Second, neither party has addressed whether
 8 Colorado’s state law is contrary to a fundamental policy of California and considers
 9 this issue waived. Accordingly, the Court applies Colorado law in determining whether
 10 Dish is a prevailing party in this case.

11 **C. Prevailing Party**

12 Defendant argues it is the prevailing party since the attorney fee provision is
 13 broad and covers tort causes of action and it succeeded in all of its litigation objectives.
 14 Plaintiff disagrees arguing that Dish is not a prevailing party because Dish prevailed
 15 on very little and the Court only determined that NWS did not possess sufficient
 16 evidence to warrant extraordinary relief. It also contends that the litigation was short-
 17 lived and that it did not drag Dish through years of litigation and did not propound
 18 unnecessary or harassing discovery.

19 “Under the American Rule, the prevailing party [in litigation] is ordinarily not
 20 entitled to collect a reasonable attorneys’ fee from the loser. This default rule can,
 21 [however,] . . . be over come by statute [or] . . . by an enforceable contract allocating
 22 attorney’s fees.” Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co., 549
 23 U.S. 443, 448 (2007) (quotations and citations omitted). In Colorado, the prevailing
 24 party in a tort or contract action cannot recover attorney fees unless a statute, private
 25 contract or procedural rule provides otherwise. Bernhard v. Farmers Ins. Exch., 915
 26 P.2d 1285, 1287 (Colo. App. 1996).

27 Fee shifting provisions contemplate that the “prevailing party” will be entitled
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1 to recover its attorney fees and that there will be one winner and one loser regarding
2 payment of those fees. Brock v. Weidner, 93 P.3d 576, 579 (Colo. App. 2004);
3 Wheeler v. T.L. Roofing, Inc., 74 P.3d 499, 503–04 (Colo. App. 2003). The trial court
4 has discretion in determining which party prevailed under a contractual fee-shifting
5 provision. Dennis I. Spencer Contractor, Inc. v. City of Aurora, 884 P.2d 326, 328
6 (Colo. 1994). However, the interpretation of such a provision constitutes a legal
7 question which is subject to *de novo* review. In re Estate of Gattis, –P.3d –, 2013 WL
8 5947134, at *8 (Colo. App. Nov. 7, 2013).

9 In order to be a prevailing party under a fee-shifting provision in a contract, “a
10 party must succeed on a significant issue in the litigation and achieve some of the
11 benefit sought.” Anderson v. Pursell, 244 P.3d 1188, 1194 (Colo. 2010). The issue
12 need not be the central issue and need only be a significant one. Id. Courts should
13 examine the overall case and where the parties spent the majority of their time and
14 resources. Id. (citing Archer v. Farmer Bros., 90 P.3d 228, 231 (Colo. 2004) (even
15 though there was an adverse judgment against prevailing party, the vast majority of the
16 time was devoted to claims that were dismissed against the party)).

17 In Brock, while the appellate court held that the trial court did not abuse its
18 discretion in declining to award attorney fees as a condition of dismissal pursuant to
19 Colorado Rule of Civil Procedure 41(a)(2), it held that the trial court abused its
20 discretion in not requiring plaintiffs to pay defendants’ reasonable costs and attorney
21 fees as the “successful parties” in the proceeding under the fee shifting provision in the
22 covenants. Brock v. Weidner, 93 P.3d 576, 579 (Colo. App. 2004). The court
23 explained that defendants achieved substantial success in the litigation by precluding
24 plaintiffs from obtaining a preliminary injunction, in defending against plaintiffs’
25 motion for partial summary judgment and plaintiffs’ demand for a jury trial, and when
26 the parties filed a joint dismissal with prejudice based on a settlement agreement they
27 had reached. Id. at 579-80. The court also held that a dismissal with prejudice of all
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1 claims against defendants is an adjudication on the merits. Id. (citing O'Done v.
 2 Shulman, 124 Colo. 445, 448 (1951); see also Harrison v. Edison Bros. Apparel Stores,
 3 Inc., 924 F.2d 530, 534 (4th Cir. 1991) (voluntary dismissal with prejudice under Fed.
 4 R. Civ. P. 41(a)(2) is a complete adjudication on the merits and no adjudication in favor
 5 of defendants, by court or jury, can rise higher)). As a result, the court held that the
 6 trial court should have awarded defendants reasonable attorney fees. Id.

7 Here, the bulk of the litigation was spent on defending Plaintiff's *ex parte*
 8 motion for temporary restraining order where Defendant defeated Plaintiff's attempt
 9 to seek an affirmative injunction. Moreover, Plaintiff filed a notice of voluntary
 10 dismissal without prejudice. Based on these two significant filings, Defendant
 11 succeeded on a significant issue in the litigation. In making a determining as to who
 12 is the prevailing party, the Court must determine which party prevailed. Brock, 93 P.3d
 13 at 580 (when a provision states that the prevailing party "shall be entitled" to recover
 14 fees, the trial court must award reasonable fees to the prevailing party). Accordingly,
 15 the Court concludes that Dish is the prevailing party under the attorney fee shifting
 16 provision in the Retailer Agreement.

17 **D. Attorney's Fees**

18 In calculating attorney's fees, the lodestar method is used. Hensley v. Eckerhart,
 19 461 U.S. 424, 433 (1983); Payan v. Nash Finch Co., 310 P.3d 212, 217 (Colo. App.
 20 2012). The lodestar is calculated by multiplying the number of hours reasonably
 21 expended on the litigation times a reasonable hourly rate. Hensley, 461 U.S. at 433;
 22 Tallitsch v. Child Support Servs., Inc., 926 P.2d 143, 147 (Colo. App. 1996). The trial
 23 court has discretion in making a determination on attorney's fees. Payan, 310 P.3d at
 24 217. "The determination of reasonableness of attorney fees is a question of fact for the
 25 trial court, and its ruling will not be disturbed on review unless patently erroneous and
 26 unsupported by the evidence." Id. (citing Tallitsch v. Child Support Servs., Inc., 926
 27 P.2d 143, 147 (Colo. App. 1996)). The court's calculation of the lodestar amount is
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entitled to a strong presumption of reasonableness. Id.

In its lodestar calculation, the court should exclude hours that were not “reasonably expended” and exclude hours that are excessive, redundant, otherwise unnecessary. . . .” Hensley, 461 U.S. at 4343. The lodestar may then “be adjusted based upon several factors, including the amount in controversy, the length of time required to represent the client effectively, the complexity of the case, the value of the legal services to the client, awards in similar cases, and the degree of success achieved. Dubray v. Intertribal Bison Co-op., 192 P.3d 604, 608 (Colo. App. 2008) (citing Tallitsch, 926 P.2d at 147.))

1. Reasonable Hourly Rate

Plaintiff does not dispute the reasonableness of Defendant’s attorneys and paralegal’s hourly rate. (Dkt. No. 31 at 23.) The hourly rates of Dish’s attorneys are the following: named partner Richard Patch (\$720/hour); partner and lead attorney Cliff Yin (\$575/hour); associate Suneeta Fernandes (\$320/hour); and paralegal Jennifer Nelson (\$295/hour).

2. Hours Reasonably Expended

Plaintiff disputes the 302.6 hours spent litigating the case from the end of September until the beginning of December 2013 as unreasonable and offensive. These hours are divided to four categories: 1) preparing the TRO opposition; 2) preparing the motion to dismiss; 3) negotiating a settlement; and 4) preparing the Fee motion.

a. Preparing the TRO Opposition

Dish billed 127 hours totaling \$56,575.50 in opposing the TRO. NWS argues that it should not take 127 hours to prepare the opposition and argues that duplicative tasks and egregious overbilling led to this number. It argues that it should not take three highly skilled and trained attorneys 80.40 hours to draft an opposition brief and supporting declarations, an additional 19 hours spent communicating amongst counsel and with Dish about the opposition; 24.7 hours researching matters related to the TRO

1 Opposition; and 9 hours spent by lead counsel to prepare and argue the TRO.
2 According to NWS, since the TRO hearing was roughly 1 hour in duration the other 8
3 hours are not reasonable. It contends that it is not reasonable for attorneys of this
4 caliber to bill more than 24 hours in just five days relating to an opposition brief.⁵

5 Dish argues that a lot of time was spent drafting the opposition because NWS's
6 motion raised several complicated issues, such as standing, irreparable harm, failure
7 to join a necessary party, and lack of common carrier status. Therefore, it was proper
8 to spend 19 hours learning about the facts, reviewing documents, interviewing Dish
9 witnesses since it had to learn about the parties' dealings which spanned several year.
10 Lead counsel explains that he spent 8 hours preparing for the hearing given the
11 multitude of issues in the case and the thirty three (33) cases cited by both parties.

12 Plaintiff presents conclusory arguments that the amounts billed were excessive,
13 duplicative, and egregious without pointing to specific entries or provide reasons why.
14 For example, NWS argues that based on the rates of Dish's counsel, they should not
15 be billing these amount of hours. (Dkt. No. 31 at 25 ("This is not reasonable,
16 especially at opposing counsel's hourly rates.") Also, without providing any legal or
17 factual support, NWS asserts that Dish's counsel is "more than capable of producing
18 a quality response in 40 to 45 hours, and should be calculated at the median between
19 Mr. Yin's and Ms. Fernandes' hourly rates, which is \$447/hour." (*Id.* at 26.) NWS
20 provides no authority that a quality response would entail only 40 to 45 hours and that
21 the rate should be calculated at the median.

22 Accordingly, the Court concludes that the hours spent on preparing the
23 opposition to the TRO application and attending the hearing are reasonable. The
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25 ⁵Plaintiff also argues that the billing entries do not indicate who drafted which
26 sections of the TRO opposition in order for NWS to ascertain who drafted the two and
27 a half pages of discussion regarding the Colorado forum selection clause and whether
28 4COMM was a necessary party because these issues were not addressed by the Court.
Contrary to Plaintiff's argument, the Court addressed these arguments in a footnote.
(Dkt. No. 16 at 10 n. 1.) Moreover, Plaintiff provides no legal support that attorney
fees do not apply to portions of briefs not addressed by a court.

1 opposition entailed 90 pages, including a 31 page brief addressing numerous issues to
2 rebut Plaintiff's argument, two declarations, a request for judicial notice and a separate
3 motion to file documents under seal. This had to be accomplished within a few days
4 due to the shortened briefing schedule. Accordingly, the number of hours spent
5 opposing the temporary restraining order was reasonable and Dish is entitled to
6 \$56,575.50 for preparing the TRO opposition.

7 **b. Preparing the Motion to Dismiss**

8 NWS argues that fees related to preparing the motion to dismiss that was filed
9 on October 24, 2013 should be excluded since Dish was informed and aware that NWS
10 was planning on dismissing the lawsuit shortly after receiving the Court's ruling on the
11 TRO filed on September 30, 2013. (Dkt. No. 31-3, Jewitt Decl. ¶ 3.) In a declaration,
12 NWS's counsel, Bradley Jewitt, states that on October 3, 2013, he spoke with Dish's
13 counsel, Clifford Yin, on the telephone to discuss the case and the proposed stipulation.
14 He advised Yin that NWS was leaning towards dismissal of the lawsuit but it could not
15 make a decision until it discussed the matter with the Navy which was not possible
16 during the government shutdown. (Id.) In response, Yin states that he spoke to Jewitt
17 by telephone on October 3, 2013, but does not recall him saying that NWS was
18 "leaning towards dismissing the lawsuit altogether" but instead NWS could not decide
19 until it talked to the Navy which he could not do because of the government shutdown.
20 (Dkt. No. 34-1, Jin Decl. ¶ 6.) The parties, however, agreed to extend Dish's time to
21 respond to the complaint for two weeks, until October 24, 2013.

22 As the government shutdown was ongoing, on October 15, 2013, NWS
23 authorized its attorney to provide Dish with a second stipulation to further extend its
24 deadlines to respond to the Complaint and Jewitt left a voicemail with Yin on October
25 16, 2013 to that effect. (Dkt. No. 31-3, Jewitt Decl. ¶ 4.) When Dish did not respond
26 to Jewitt's voicemail, he sent Yin a follow up email on October 18, 2013 concerning
27 the stipulation. (Id. ¶ 5.) In that email response, Dish indicated that it did not need
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1 another extension and intended to file its motion to dismiss on October 24, 2013. (Dkt.
2 No. 31-4, Ex. 4.)

3 According to Dish, since the October 24, 2013 deadline was not far away and it
4 had not heard anything from NWS and given the complexity of the issues in the case,
5 Dish's counsel continued to work on the motion to dismiss but in a limited manner
6 from October 7- October 16, 2014. (Id. ¶ 7.) During the week of October 7, 2013, Yin
7 only spent 5.4 hours working on the motion to dismiss. (Id.) However, by October 18,
8 2013, Dish had largely completed the motion to dismiss and indicated by email that he
9 did not need an additional extension and Dish would file a response on October 24,
10 2013. (Id. ¶ 9.)

11 While it is disputed whether NWS informed Dish that it was intending to dismiss
12 the lawsuit on October 3, 2013, there was the possibility that the Navy might dismiss
13 the case. Therefore, the parties agreed to extend Dish's time to file a responsive
14 pleading. This put Dish on notice that the case might be dismissed and allowed Dish
15 to put a halt on its work on the motion to dismiss. This is highlighted by the fact that
16 Dish's counsel admits he limited the amount of work on the motion to dismiss from
17 October 7-October 16, 2014. Moreover, on October 16, 2013, Dish was provided
18 another opportunity to stipulate to an extension of time to file a responsive pleading
19 which would limit unnecessary fees on a motion to dismiss; however, Dish refused and
20 billed unnecessary hours to finalize and file the motion to dismiss.

21 Accordingly, the Court concludes that the hours spent on the motion to dismiss
22 after October 3, 2013 were unreasonable. The total amount of hours and fees that were
23 billed from October 4-October 24, 2013 on the motion to dismiss is not easily
24 ascertainable from the record. Therefore, Dish's counsel shall exclude those fees from
25 the award of attorneys' fees.

26 **c. Settlement Discussions**

27 After NWS informed Dish that it intended on dismissing the case, the parties
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1 entered into negotiations as to settlement and dismissal of the case.

2 NWS argues that the fifteen hours spending on settlement discussions from
3 November 18, 2013 to November 21, 2013 are not reasonable especially since counsel
4 only spoke on the phone two or three times and never more than 10 minutes. (Dkt. No.
5 31-3, Jewett Decl. ¶ 6.) Dish argues that the 14.7 hours spent on settlement discussions
6 and drafting a settlement agreement which included research were reasonable. It
7 contends that the settlement agreement was complicated because it required an analysis
8 of what claims Dish may have against NWS which involved analyzing what obligations
9 under the thirty nine (39) page Retailer Agreement would remain in effect following
10 the settlement. Yin states that the drafting of the settlement agreement was complicated
11 because they were negotiating a full mutual release. (Dkt. No. 34-1, Yin Reply Decl.
12 ¶ 14.)

13 Contrary to Plaintiff's argument, the settlement discussions and drafting of the
14 settlement agreement were not routine but work intensive involving analysis of the
15 entire Retailer Agreement. Moreover, NWS's counsel delegated the task of drafting
16 the settlement agreement to Dish. (Dkt. No. 31-3, Jewett Decl., Ex. 5.) Accordingly,
17 the Court finds the fees of \$7,854.00 related to settlement discussions are reasonable.

18 **d. Preparing the Fee Motion**

19 In its moving papers, Dish sought \$40,413.50 in the preparation of this fee
20 motion plus an additional estimated amount \$15,000 to review NWS's opposition,
21 prepare a reply and prepare for and attend oral argument. In its reply, based on write-
22 offs to Dish that occurred after the filing of its motion, the amount is reduced to
23 \$21,804.25 plus an additional \$13,729.50 preparing the reply, declarations, and
24 response to NWS's evidentiary objections. (Dkt. No. 34-1, Yin Reply Decl. ¶¶ 18, 19.)
25 The fees total \$35,533.75.

26 Plaintiff opposes arguing that Defendant's counsel "undoubtedly has dozens, if
27 not hundreds, of former prevailing party attorney fee motions saved to the firm's
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1 computer system to use as drafting templates, and most certainly used one or more of
2 them to expedite preparing the Fee motion.” (Dkt. No. at 31 at 31.) Plaintiff argues
3 that the fees should not exceed 20 hours and should be calculated at the median
4 between Mr. Yin’s and Ms. Fernandes’ hourly rates, which is \$447/hour.

5 Dish argues that a attorney fee motion is time consuming requiring an analysis,
6 coding and breakdown of every entry billed, plus separate declarations for every
7 timekeeping, and legal research and analysis. Moreover, a significant amount of time
8 was spent analyzing and providing evidentiary support of its requested rates which
9 included a thirty three (33) page declaration from an attorney fee rate expert. Based on
10 this declaration, Dish notes that NWS conceded that Dish’s requested rates are
11 reasonable.

12 Again, Plaintiff provides no authority for its calculations and provides summary
13 arguments. Accordingly, the Court finds that the attorney fees of \$35,533.75, which
14 includes significant write offs, spent on filing the motion for attorney fees is
15 reasonable.

16 **E. Evidentiary Objections**

17 Plaintiff filed evidentiary objections to the Andersen Declaration and the
18 attached Retailer Agreement. (Dkt. No. 32.) Defendant opposes. (Dkt. No. 33.)
19 Because Van Vorst’s declaration and attachment satisfies Rule 901, the Court overrules
20 Plaintiff’s objections as to the Andersen declaration.

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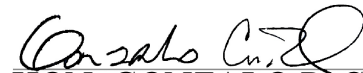
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Conclusion

Based on the above, the Court GRANTS in part and DENIES in part Defendant's motion to dismiss. Defendant shall be entitled to attorney fees as follows: \$56,575.50 in opposing the TRO; \$7,854.00 in settlement discussions; and \$35,533.75 in preparing the Fee motion. Defendant shall also be entitled to attorney fees for work in preparing the motion to dismiss until October 3, 2013. The hearing set for February 28, 2014 shall be vacated.

IT IS SO ORDERED.

DATED: February 24, 2014


HON. GONZALO P. CURIEL
United States District Judge